UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

BENNIE L. HART,

Plaintiff,

v.

GREG THOMAS, in his official capacity as Secretary of the Kentucky Transportation Cabinet,

Defendant.

Case No. 3:16cv00092-GFVT

Electronically Filed

PLAINTIFF'S RESPONSE OPPOSING
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Local Rule (LR) 7.1(c), Plaintiff, by counsel, submits this response opposing Defendant's motion for judgment on the pleadings. [RE #14.] As is explained more fully below, Defendant's motion should be denied because: 1) it is well settled that sovereign immunity does not bar official capacity claims that seek prospective injunctive relief (such as those asserted in this action); 2) Plaintiff's material allegations establish that personalized license plate messages are private speech; and 3) even assuming *arguendo* that Kentucky's personalized license plate scheme represents a nonpublic forum for private expression, the challenged regulations are unreasonable, viewpoint discriminatory, or both in violation of the First Amendment.

COUNTER-STATEMENT OF FACTS

Statutory and Regulatory Framework

Kentucky has enacted a statutory framework for the licensing of vehicles that requires, *inter alia*, that they be registered and must display a state-issued license plate. *See* KRS Ch. 186; 186A. On a standard-issue Kentucky license plate, the plate number consists of a unique combination of three letters and three numbers generated by the Kentucky Transportation Cabinet. KRS § 186.005(2). For an additional fee, Kentucky vehicle owners may select their own unique letter and number configuration for their license plates, and these plates are known as "personalized license plates." KRS § 186.174. Under Kentucky law, a "personalized license plate" is explicitly defined as a license plate "issued with *personal letters or numbers significant to the applicant*." KRS § 186.174(1) (emphasis added).

Individuals who want a personalized license plate must apply for one with the county clerk's office and pay the proscribed fee. KRS § 186.174(2). Initial applications for personalized license plates must be made in person, but subsequent renewals may be made by mail. *Id*. Upon receipt of the personalized license plate application, the county clerk must forward the application to the Transportation Cabinet for review. *Id*. Then, the Transportation Cabinet approves, or denies, the application under differing standards depending upon whether the application is for a new personalized license plate or for the renewal of an existing one.

For the issuance of a *new* personalized license plate, KRS § 186.174(3) mandates that the letter and/or number combination requested by the applicant must be unique and must comply "with the conditions specified in KRS § 186.164(9)(c) to (g)." And those

statutory provisions consist of requirements governing the issuance of "special license plates," *i.e.* license plate styles that are issued "to a group or organization that readily identifies the operator of the [vehicle] as a member of the group or organization, or a supporter of the work, goals, or mission of a group or organization." KRS § 186.162(1)(a). Thus, the statutory requirements for both the creation of "special license plates" *and* for the issuance of new "personalized license plates" mandate that the license plate *shall not*:

- "discriminate against any race, color, religion, sex, or national origin, and shall not be construed, as determined by the cabinet, as an attempt to victimize or intimidate any person due to the person's race, color, religion, sex, or national origin" KRS § 186.164(9)(c);
- "have been created primarily to promote a specific political belief" KRS § 186.164(9)(d);
- "have as its primary purpose the promotion of any specific faith, religion, or antireligion" KRS § 186.164(9)(e);
- "be construed, as determined by the cabinet, as promoting a product or brand name" KRS § 186.164(9)(f); and
- "be obscene, as determined by the cabinet." KRS § 186.164(9)(g).

By contrast, applications seeking to renew personalized license plates *that have already been issued* but were issued "through oversight or any other reason" may be denied by the Transportation Cabinet if, in the Cabinet's determination, the personalized license plate is "offensive to good taste and decency." 601 KAR 9:012 sec. 5(1).

Facts of This Case

Plaintiff Hart lived in Ohio for many years where he requested, and obtained, an Ohio-issued personalized license plate that read "IM GOD." [RE #1: Verified Complaint ("Compl."), ⁋ 10.] Plaintiff displayed his personalized license plate on his vehicle for approximately twelve years without it creating any adverse incidents. [*Id.*] He chose that particular personalized message for his license plate because he wished to convey a philosophical message concerning his views about religion. [*Id.* at ⁋ 11.] Specifically, Plaintiff, who identifies as an atheist, asserts that it is impossible to disprove (*via* the scientific method or otherwise) any individual's assertion that he or she is "God." Thus, Plaintiff's personalized message communicating such a proclamation represents a commentary on how religious belief is highly susceptible to individual interpretation. [*Id.*]

When Plaintiff moved to Kentucky in February, 2016, he registered his vehicle in Kentucky. [*Id.* at ⁋ 12.] And he applied for a personalized license plate as he had in Ohio, specifically requesting the same unique combination of letters that conveyed his personalized message — "IM GOD." [*Id.*]

However, by letter dated March 11, 2016, the Cabinet denied Plaintiff's requested personalized license plate. [*Id.* at ⁋ 14; RE #1-1: Pl. Exh. 1.] In doing so, Ainsley W. Snyder, Administrative Branch Manager for Kentucky's Division of Motor Vehicle Licensing, explained that the Cabinet rejected the requested personalized license plate "because it does not meet the requirements of KRS 186.174 and 601 KAR 9:012. Section 5. These laws dictate that *a personalized plate may not be vulgar or obscene*." [*Id.* (emphasis added).] Plaintiff, by counsel, responded in a letter to then-Commissioner Kuhl

disputing that the requested license plate message constituted "vulgar or obscene" language. [RE #1-2: Pl. Exh. 2.] Then, Senior Counsel J. Todd Shipp with Kentucky's Office of Legal Services replied to Plaintiff's counsel. [RE #1-3: Pl. Exh. 3.] In his April 7, 2016, letter, Mr. Shipp stated that the Cabinet did not reject Plaintiff's requested personalized license plate under a "vulgar or obscene" standard, but rather because "the use of 'IM GOD' is not in good taste and would create the potential of distraction to other drivers and possibly confrontations." [*Id.*] Mr. Shipp cited 601 KAR 9:012 and its "good taste and decency" standard as the relevant basis for denying Plaintiff's personalized license plate application, and he explained that the Cabinet "would have taken the very same position had the individual requested plates that read "IM ALLAH" or "IM BUDDAH" or "IM SATAN." [*Id.*][1]

Thus, in denying Plaintiff's request for the issuance of a new personalized license plate, Plaintiff received denials from the Cabinet under two different standards. First, the Cabinet purported to deny Plaintiff's request on the basis that the personalized license plate would be "vulgar or obscene" (and thus presumably contrary to the "obscene" standard contained in KRS § 186.164(9)(g) which is incorporated by reference by KRS § 186.174(3) for reviewing *new* personalized license plate applications). Then, after disclaiming its earlier rationale, the Cabinet rejected Plaintiff's request stating that the proposed personalized license plate would be contrary to "good taste and decency" even though that standard (contained in 601 KAR 9:012 sec. 5(1)) is for personalized license

[1] Mr. Shipp also explained that the Kentucky Transportation Cabinet "strongly believes the decision it made to reject [Plaintiff's] application for a personalized license plate . . . [is] legally supported" by the Supreme Court's decision in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). [*Id.*]

plate *renewals*, not for the issuance of a *new* personalized license plate (as was Plaintiff's request).

Plaintiff's Claims

Having failed to secure relief from the Cabinet, Plaintiff filed this official capacity suit seeking prospective injunctive relief against Kentucky Transportation Cabinet Secretary Greg Thomas on November 22, 2016. [RE #1: Compl.][2] In it, Plaintiff seeks to enjoin future enforcement of those provisions previously relied upon by the Cabinet to deny his request when he reapplies for the same personalized license plate. [*Id*. at 11-12, ⁋⁋ 5-6.] And he challenges some, but not all, of the statutory and regulatory requirements on the issuance of new personalized license plates, both facially and as-applied. [*Id*. at ⁋⁋ 36-40.] Specifically, Plaintiff challenges:

- 601 KAR 9:012(5) (authorizing Cabinet to recall any personalized license plate already issued if deemed by the Cabinet to be contrary to "good taste and decency"), both facially and as-applied;
- KRS § 186.164(9)(d) (barring license plates that "have been created primarily to promote a specific political belief"), as incorporated by KRS § 186.174(3), both facially and as-applied; and
- KRS § 186.164(9)(e) (barring license plates that "have as its primary purpose the promotion of any specific faith, religion, or antireligion"), as incorporated by KRS § 186.174(3), both facially and as-applied.

[2] In addition to permanent injunctive relief, Plaintiff also seeks declaratory relief and reasonable attorneys' fees and costs. [RE #1: Compl., 11-12 ⁋⁋ 1-8.]

After filing his Answer, Defendant now seeks a judgment on the pleadings arguing that: 1) Eleventh Amendment sovereign immunity bars Plaintiff's action [RE #14-1: Memo. In Support of Def. Motion for Judgment on the Pleadings ("Def. Memo."), at 4-5]; 2) personalized license plate messages comprise government, not private, speech; thus, the regulation of them does not implicate the First Amendment's Free Speech clause [*id*. at 6-10]; and 3) even if personalized license plates constitute private speech, Kentucky's restrictions are valid under the First Amendment because they are neither viewpoint-based nor impermissibly vague. [*Id*. at 11-15.] For the reasons that follow, Defendant's motion should be denied.

ARGUMENT

Under Fed.R.Civ.P. 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The standard for granting judgment on the pleadings is the same as that for motions brought under Rule 12(b)(6) seeking dismissal for failure to state a claim. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *Zeigler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001)). Thus, "[f]or purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the [non-movant] must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Nicely v. PLIVA, Inc.*, 181 F.Supp.3d 451, 455 (E.D. Ky. 2016) (quoting *JP Morgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (internal quotation marks and citations omitted)). And, as "is the case with a motion to dismiss under Rule 12(b)(6), in a Rule 12(c) motion for judgment on the pleadings, the Court is required to 'accept all the Plaintiffs' factual allegations as true and construe the

complaint in the light most favorable to the Plaintiffs.'" *Id*. at 455 (quoting *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005)).

I. ELEVENTH AMENDMENT IMMUNITY DOES NOT BAR DECLARATORY OR PROSPECTIVE INJUNCTIVE RELIEF CLAIMS AGAINST STATE OFFICIALS SUED IN THEIR OFFICIAL CAPACITY.

Defendant's leading argument in support of his motion for judgment on the pleadings is that Plaintiff's claims are barred by Eleventh Amendment sovereign immunity. [RE #14-1: Def. Memo., at 4-6.] While Plaintiff agrees with the proposition that the Eleventh Amendment generally bars suits against a state or state agency, Defendant is simply incorrect in asserting that it bars Plaintiff's claims here. For more than one hundred years, it has been clearly established that plaintiffs may bring official-capacity claims against state officials to enjoin those officials from committing future violations of individuals' federally protected rights, such as the claims asserted in this case. *Ex Parte Young*, 209 U.S. 123 (1908). Of course, this exception to Eleventh Amendment sovereign immunity does not apply to claims asserted against the states or state agencies, but rather to claims brought against the particular state official responsible for enforcing the challenged statute. *Alabama v. Pugh*, 438 U.S. 781 (1978). And here, the particular state official responsible for enforcing the challenged statute and regulation is Greg Thomas, the Secretary of the Kentucky Transportation Cabinet. [RE #1: Compl., ¶ 5.] And, as is permitted under *Ex Parte Young*, Plaintiff asserts official capacity claims against Defendant Thomas — a state official acting under color of state law [*id*. at ¶ 6] — to enjoin *future* violations of Plaintiff's federal constitutional rights. [*Id*. at ¶¶ 33-40.]

Notwithstanding the clearly established exception to Eleventh Amendment immunity, Defendant Thomas seemingly conflates suits against the state with official

capacity claims seeking to enjoin state officials from future violations of federally protected rights. For example, Defendant attempts to support his Eleventh Amendment immunity argument by citing a 1995 decision from the 6th Circuit Court of Appeals. [RE #14-1: Def. Memo., 4-5 (citing *Cox v. Kentucky Department of Transportation*, 53 F.3d 146 (6th Cir. 1995)).] In so doing, Defendant quotes a portion of a footnote from that decision upholding the dismissal of First Amendment claims brought against the Kentucky Department of Transportation. [*Id.* at 5.] However, Defendant fails to include the final sentence of that very same footnote that, had he done so, would have made clear that his argument here is without merit. "The [Eleventh] amendment also bars suits seeking monetary damages against individuals in their official capacities, *but does not preclude suits seeking prospective injunctive or declaratory relief against state officials.*" *Cox*, 53 F.3d at 152 n.2 (citing *Thiokol Corp. v. Department of Treasury*, 987 F.2d 376 (6th Cir. 1993); *Ex Parte Young*, 209 U.S. 123 (1908)). *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.") (internal quotation marks and citation omitted))

Because Plaintiff's suit names Defendant Thomas in his official capacity and seeks declaratory and prospective injunctive relief to enjoin future violations of Plaintiff's federally protected constitutional rights, Eleventh Amendment sovereign immunity neither bars this action nor provides a basis upon which to grant Defendant's motion for judgment on the pleadings.

II. KENTUCKY'S PERSONALIZED LICENSE PLATES COMMUNICATE PRIVATE, NOT GOVERNMENT SPEECH.

Defendant also seeks judgment on the pleadings on the basis that personalized license plate messages comprise government, not private speech, and therefore Kentucky's regulation of them does not implicate the First Amendment's Free Speech clause. [RE #14-1: Def. Memo, 6-11.] But this conclusion relies upon a flawed application of the Supreme Court's precedents concerning government versus private speech, including the recent decision of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). In order to fully appreciate that misapplication, *Walker* must first be analyzed for what it does (and does not) hold.

In *Walker*, the Court held that Texas's rejection of a specialty license plate design as offensive did not implicate the First Amendment speech rights of the organization that proposed it because specialty license plates constitute government, not private, speech. *Id*. at 2246; 2249. The Court looked to its earlier decision in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) which held that a monument donated to a city for display in a city-owned park represented government, not private speech. *Id*. at 2247. And it described the relevant factors that contributed to the holding in *Summun* as being: 1) the historical use of monuments as a means of expression; 2) that property owners generally agree with the messages communicated on their property; 3) the degree of control retained by the city over selecting monuments for inclusion in the park; and 4) "a few other relevant considerations." *Walker*, 135 S.Ct. at 2247.

The *Walker* Court then looked to some of these factors to reach the result that specialty license plates are likewise government speech. For example, the Court concluded that license plates designs have for many years communicated messages from the states such as mottos, slogans, and other messages. *Id*. at 2248. It also found that

"license plate designs 'are often closely identified in the public mind with the [State].'" *Id*. at 2248-49 (quoting *Summum*, 555 U.S. at 472). Moreover, it deemed the license plate design to be akin to a government-issued ID. *Id*. at 2249. From this, the Court concluded both that: 1) the "issuers of IDs 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated"), *id*. at 2249 (quoting *Summum*, 555 U.S. at 471); and 2) third parties "routinely—and reasonably—interpret" the license plate design as communicating a message by the State. *Id*. And finally, the Court found that the state exercised sole control over approving (or denying) proposed license plate designs; thus, that factor, too, weighed in favor of finding that the license plate designs constituted government speech. *Id*. at 2249.

Notably, the *Walker* Court confined its holding to specialty license plate designs and explicitly *excluded* personalized license plates such as are at issue here. *Id*. at 2244. And it further did not consider other "factors" that it had in *Summum* because it deemed them irrelevant. *Id*. at 2249 (fact that monuments are "permanent" and that only a limited number may be displayed on city-owned property irrelevant).

From this, Defendant argues that *Walker*'s government speech holding should be extended to include personalized license plates because an examination of the relevant factors weighs in favor of doing so. [RE #14-1: Def. Memo, 8-11.] But, Defendant misapplies that analysis in two key ways. First, Defendant reaches the incorrect result as to two critical factors — historical use of personalized license plates and the identification of personalized license plates as communicating a government message. And Defendant also ignores a related factor that further distinguishes this case from

Walker; namely, that personalized license plates are widely perceived as communicating private, not government, speech.

Specifically, personalized license plate messages are neither historically associated with any message communicated by the state, nor are they perceived by third-parties as communicating a government message. And this court need not accept Plaintiff's pre-discovery allegation to support this conclusion (even though it would be sufficient to defeat Defendant's motion for judgment on the pleadings). Instead, this court may look to Kentucky law which defines "personalized license plate" as a license plate "issued with *personal letters or numbers significant to the applicant*." KRS § 186.174(1) (emphasis added). This statute establishes that, in Kentucky, personalized license plates consist of letters and numbers personally significant to the applicant. Thus, the message communicated by personalized license plates is that of the vehicle owner, not the government. This conclusion comports with common experience because no reasonable observer would perceive personalized license plate messages as being government speech. "[T]he personal nature of a message on a vanity plate makes clear that the vehicle owner, not the State, is speaking." *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 194 (Md. Ct. Spec. App. 2015) (holding that vanity plate messages are individual, not government, speech, in nonpublic forum and that government regulation of them is constitutionally permissible if the regulations are reasonable and viewpoint neutral); *Matwyuk v. Johnson*, 22 F.Supp.3d 812, 823 (W.D. Mi. 2014) (in denying defendant's motion to dismiss asserting qualified immunity, stating that "Michigan's personalized license plates at issue . . . cannot reasonably be considered government speech."). *But see*

Commissioner of Indiana Bureau of Motor Vehicles v. Vawter, 45 N.E.3d 1200 (Ind. 2015) (holding that vanity plate messages are government speech).

As noted in *Mitchell*, an historical analysis of specialty and personalized license plates reveals that while the former may be properly considered as having been used to communicate a government message, the latter may not because personalized license plates are primarily a revenue-generating device by which vehicle owners could communicate personalized messages on their automobiles for a higher licensing fee. *Mitchell*, 126 A.3d at 192 ("It is evident, therefore, that Maryland's purpose in establishing a vanity plate program was, and still is, to raise money."). Moreover, "[t]he message on a vanity plate serves the owner's purpose of drawing attention to himself. That is the genesis of the nickname 'vanity plates'. So, historically, vehicle owners have used vanity plates to communicate their own personal message *and the State has not used vanity plates to communicate any message at all*." *Id*. at 185 (emphasis added).[3]

Similarly, the public perceives personalized license plates as communicating messages of individual vehicle owners, not the government. "From the vehicle owner's perspective, his vanity plates tell the world something about himself. From other drivers' perspectives, vanity plates tell them something about the vehicle's owner, or at least challenge them to figure out what the owner is trying to communicate." *Id.* at 185. This is highlighted by the fact that, unlike a specialty plate design which will be common to

[3] This conclusion is further reinforced by Plaintiff's factual allegations that, for the purpose of deciding the present motion, must be accepted as true. [See RE #1: Compl., ¶ 9 ("Vehicle owners who participate in the personalized plate program typically select a configuration of letters and numbers that convey a meaningful expression their personal identity, values, or sense of humor that is understandable to others who view the licsense plate.").]

every vehicle bearing that particular specialty plate, personalized license plates are one-of-a-kind. *See Mitchell*, 126 A.3d at 185 ("The personal nature of a vanity plate message makes it unlikely that members of the public, upon seeing the vanity plate, will think the message comes from the State."); *id*. at 185 n.26 (citing Justice Souter's concurrence in *Summum* in which he observed that the "best approach" to deciding between government and private speech is to "ask whether a reasonable and fully informed observed would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.").

Even though the Defendant is correct that Kentucky retains exclusive control over approving personalized license plates, that factor is not dispositive here because, as noted above, no reasonable observer would perceive personalized license plates as communicating a government message. "At most, they would assume that the State had permitted the vehicle owners to display the owner's requested message on the vanity plate." *Mitchell*, 126 A.3d at 186. Thus, when properly viewed, the *Walker* factors weigh in favor of concluding that personalized license plates communicate private, not government, speech.[4]

III. THE CHALLENGED RESTRICTIONS ON PERSONALIZED LICENSE PLATE MESSAGES ARE NEITHER REASONABLE NOR VIEWPOINT NEUTRAL.

For the reasons noted above, Plaintiff's Verified Complaint (when properly construed in his favor) establishes that personalized license plates in Kentucky

[4] The 6th Circuit's decision in *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) does not compel a different result. *Bredesen*, a pre-*Walker* decision, merely reached the same result as *Walker* — that specialty plate designs represent government speech.

communicate individual, not government, speech. Thus, the remaining question for the court becomes whether Defendant is entitled to judgment on the pleadings with respect to the validity of the regulations governing that private speech. In short, the Defendant is not so entitled. At the outset, Plaintiff agrees that personalized license plates do not constitute a traditional public forum for which strict scrutiny would apply. However, and without further conceding the appropriate forum analysis to be applied, Plaintiff maintains that even assuming *arguendo* that personalized license plates represent a nonpublic forum, Defendant's motion for judgment on the pleadings should nonetheless be denied because Kentucky's regulations are neither reasonable nor viewpoint neutral.

Specifically, Plaintiff challenges the following provisions regarding the issuance of personalized license plates:

1) 601 KAR 9:012(5) authorizes the Cabinet to revoke (or deny renewal applications of) *already issued* personalized license plates if, in the Cabinet's determination, the license plate is "offensive to good taste and decency";

2) KRS § 186.164(9)(d) (as incorporated by KRS § 186.174(3)) bars the issuance of a *new* personalized license plates that has "been created primarily to promote a specific political belief"; and

3) KRS § 186.164(9)(e) (as incorporated by KRS § 186.174(3)) bars the issuance of a *new* personalized license plate that has "as its primary purpose the promotion of any specific faith, religion, or antireligion."

[RE #1: Compl., ⁋⁋ 36-40.]

Taken in order, an examination of each reveals that Defendant is not entitled to judgment on the pleadings. First, the state initially denied Plaintiff's requested license

plate citing to 601 KAR 9:012(5)[5] which contains an "offensive to good taste and decency" standard. Plaintiff has challenged this regulation on its face and as-applied, asserting both vagueness and overbreadth. [RE #1: Compl., ¶¶ 36-39.] Here, as in *Matwyuk*, the "'offensive to good taste and decency' language impermissibly permits the [State] to deny a license plate application based on viewpoint because the statute lacks objective criteria, and thus confers unbounded discretion on the decisionmaker." *Matwyuk*, 22 F.Supp.3d at 824 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)); *see also Montenegro v. New Hampshire Div. of Motor Vehicles*, 93 A.3d 290 (N.H. 2014) (because "the offensive to good taste standard is not susceptible of objective definition, the restriction grants the [State] the power to deny a proposed vanity registration plate because it offends particular officials' subjective idea of what is good taste") (internal quotation marks omitted).

Similarly, judgment on the pleadings is inappropriate on Plaintiff's challenge to the restriction on personalized license plates contained in KRS § 186.164(9)(d) (as incorporated by KRS § 186.174(3)) which bars their issuance if they have "been created primarily *to promote a specific political belief*." Even under a nonpublic forum analysis, such a restriction cannot stand because its proscription is unreasonable in light of the purported purpose served by the forum at issue. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) ("control over access to a nonpublic

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[5] The state denied Plaintiff's request for a new personalized license plate citing to 601 KAR 9:012(5) even though that regulation pertains to the revocation or denial of renewal applications for *existing* personalized license plates. And even though the regulation contains an "offensive to good taste and decency" standard, the state articulated its rationale for initially denying Plaintiff's requested plate as being that the personalized license plate would be "vulgar or obscene." [RE #1-1: Exh. 1.]

forum can be based on subject matter and speaker identity *so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral*.") (emphasis added); *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding policy barring political advertisements on city operated transit system because restriction reasonable "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, which are reasonable legislative objectives advanced by the city in a proprietary capacity."); *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995) ("the reasonableness of excluding political advertisements must be judged in light of the nature and purpose of the diorama display cases in an airport terminal. Although this inquiry does not demand the most reasonable limitation, it does require a determination of whether the proposed conduct would actually interfere with the forum's stated purposes.") (internal quotation marks and citation omitted). Unlike the political advertisement ban in *Shaker Heights*, the peculiar factors relevant to that decision are absent here. Because personalized license plates are properly viewed as individual, not government speech, there is no appreciable risk associated with the state appearing to favor one political view over another or of abuse. Nor is the "captive audience" concern present in the personalized license plate context as with advertisements appearing in public transit vehicles.

And finally, judgment on the pleadings is also inappropriate with respect to Plaintiff's challenge to KRS § 186.164(9)(e) (as incorporated by KRS § 186.174(3)) which bars the issuance of personalized license plates that have as their "primary purpose the promotion of any specific faith, religion, or antireligion." As with the political belief prohibition discussed, *supra*, such a categorical ban is unreasonable even under a

nonpublic forum analysis — a fact that has been noted by the 2nd Circuit Court of Appeals in *Byrne v. Rutledge*, 623 F.3d 46, 58-59 (2d Cir. 2010). There, in rejecting the state's contention that a prohibition on all "religious" speech, "whether positive, negative, or neutral" in issuing vanity plates represented a viewpoint neutral policy, the Court of Appeals noted that "[i]n the context of restrictions on all religious speech, this argument has been expressly considered -- and rejected -- by the Supreme Court." *Byrne*, 623 F.3d at 58 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995)). *See also Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In doing so, the Court observed that:

> More generally, *Lamb's Chapel, Rosenberger*, and *Good News Club*, read together, sharply draw into question whether a blanket ban such as Vermont's on all religious messages in a forum that has otherwise been broadly opened to expression on a wide variety of subjects can neatly be classified as purely a "subject matter" restriction for purposes of First Amendment analysis. As the Court explained in *Rosenberger*, religion is not just a "vast area" but "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id*. at 831. Similarly, in *Good News Club*, 533 U.S. at 111, the Court rejected the argument that speech labeled "quintessentially religious . . . cannot also be characterized properly as [speech]. . . from a particular viewpoint." As the Court explained, "for purposes of the Free Speech Clause," there is "no logical difference in kind between" one community group's "invocation of [religion]" and another's "invocation of teamwork, loyalty, or patriotism" as a "*foundation for*" discussion of many subjects. *Id*. (emphasis added).

Byrne v. Rutledge, 623 F.3d at 58-59.[6]

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[6] Plaintiff also alleges in his Complaint that "[u]pon information and belief, the Kentucky Transportation Cabinet has approved personalized license plates that include religious messages." [RE #1: Compl., ¶ 16.] Thus, when properly construed in Plaintiff's favor, this allegation plausibly suggests viewpoint discrimination by the Cabinet that would further undermine Defendant's argument that he is "clearly entitled" to judgment on the pleadings.

Thus, when Plaintiff's factual allegations are taken as true, and when the complaint is construed in Plaintiff's favor, Defendant is not "clearly entitled" to judgment on the pleadings. Plaintiff's allegations, as well as Kentucky law, establish that personalized license plate messages constitute individual, not government, expression. And even assuming, for the purposes of Defendant's motion, that Kentucky's personalized license plate scheme creates merely a nonpublic forum for that private speech, the challenged restrictions are unreasonable, viewpoint discriminatory, or both, in light of any purported state interests in regulating the forum.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendant's motion for judgment on the pleadings be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 18, 2017, I electronically filed this Notice with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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